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BASF AG Ludwigshafen

EPO
Erhardstr. 27
80331 Munich

European Patent No.: EP 1,005,323 B1

Application No.: 98942750.5

Patentee: L'Oréal

Cosmetic composition containing an aqueous polymer dispersion and a disilanol-terminated silicone emulsion and process

Priority Date: 19 Aug 1997

Application Date: 18 Aug 1998

We hereby file an

OPPOSITION

against the above-referenced European patent.

We request that the patent be revoked in its entirety.

We request oral proceedings if necessary.

The basis for the opposition is that the subject matter of the patent is not patentable under Articles 52 through 57 EPC.

Grounds for the opposition are presented in Appendix 1.

Please charge the opposition fee (code 010) in the amount of €610.00 to our checking account No. 2800.0009.

The attached copy of this correspondence is intended for the "Collections and Accounting" department.

BASF Aktiengesellschaft
for Maurer (AV¹ No. 3224)

Encl:

- Grounds for opposition
- Observations [D1] – [D4] (2 copies)
- Copy for Collections and Accounting department

¹ TN: Unknown abbreviation.

I. Grounds for Opposition

The patent at issue is not patentable under Article 100(a) EPC because the requirements for novelty and inventive step (Articles 54 and 56 EPC) have not been met.

II. Observations (See Appendix)

[D1] EP 0,240,349 A2 (The Procter & Gamble Company)

Published on October 7, 1987

[D2] WO 92/21316 (L'Oréal)

Published on December 10, 1992

[D3] Dow Corning

Silicone für die Körperpflege – Auswahlleitfaden² –
1997, 1998

[D4] GB 2,114,580 A (L'Oréal)

Published on August 24, 1983

III. Subject Matter of the Patent at Issue

The subject matter of the patent at issue (claim 1) is a cosmetic composition characterized in that it comprises:

- in a cosmetically acceptable medium

² TN: *Silicones for Personal Care: Selection Guidelines*

- an aqueous dispersion of insoluble polymer particles ("polymer dispersion") and
- a non-amino α,ω -disilanol-terminated silicone emulsion³ ("silicone emulsion")
- wherein said emulsion constitutes 0.05 to 10% by weight with respect to the total weight of the composition.

Put more simply, the patent claims compositions containing two components: a polymer dispersion and a specific silicone emulsion, where the silicone emulsion content is pre-specified.

Dependent claims 2 through 15 cover preferred embodiments of the composition.

Claim 16 recites a process for the cosmetic treatment of keratinous matter, wherein the composition according to any of claims 1 through 15 is applied to the keratinous matter selected for treatment.

IV. Novelty

IV.I Lack of Novelty over [D1]

[D1] discloses a cosmetic composition for the hair containing a silicone emulsion. The emulsion consists of a dispersed phase of an anionic and stabilized hydroxylated polydiorganosiloxane⁴ and an aqueous continuous phase ([D1], page 2, lines 57-58). The cosmetic compositions for the hair of [D1] contain from 0.1% to 5% silicone emulsion with

³ TN: This is the translation recommended by our chemistry expert for the French used here. It is largely consistent with the abstract of US Pat. Application 202/0098212 A1, but not with the specification (e.g. page 1, para. 8) of the application, since the abstract and specification do not agree.

⁴ TN: Although the French source text refers here to "*anionic and stabilized* hydroxylated polydiorganosiloxane," the actual text of D1 (a US patent) discloses *anionically stabilized* hydroxylated polydiorganosiloxane.

respect to the total composition. The cosmetic compositions for the hair of [D1] may contain other ingredients, preferably hair-setting polymers ([D1], page 3, lines 19-20). Polymers that are soluble or dispersible in water are cited by [D1] as suitable polymers.

Therefore, the cosmetic compositions according to claim 1 have already been proposed by [D1], which destroys the novelty of the compositions.

V. Inventive Step

Even if the Opposition Division finds that the invention of the patent at issue is novel despite the facts presented above, the patent still does not involve inventive step.

According to the specification, the purpose of the patent at issue is to propose a hair-setting agent with "good cosmetic properties."

Subject Matter and Theory of [D4]

[D4] discloses compositions for treatment of the skin, hair or nails. Example 6 of [D4] discloses a composition for the hair that provides hold and contains an aqueous polymer dispersion (Rhodopas® AM 012) and 2% by weight (active ingredient) of a cationic emulsion of an amodimethicone (Dow Corning® 929). This composition is applied to the hair and provides "good hold" ([D4] page 12, line 15).

Subject Matter and Theory of [D2]

[D2] discloses a composition for treatment of the hair. Example 1 of [D2] discloses a "leave-in" product containing an aqueous dispersion of a polyvinyl acetate (Rhodopas® A 012 PA

supplied by Rhône-Poulenc). Rhodopas® A 012 PA is mentioned in the patent at issue on page 3, line 14 as an aqueous polymer dispersion that is suitable with respect to claim 1. Moreover, the cosmetic composition for the hair of Example 1 of [D2] contains 20.0 g of a mixture of 13% dimethiconol and 87% other silicones. Dimethiconol is the INCI name for hydroxyl-terminated dimethylsiloxane (= α -hydroxy, ω -hydroxypolydimethylsiloxane). According to claim 1 of the patent at issue, this means that the composition comprises 2.6% silicone relative to the total composition (100 g).

The same is true for Example 7 (the aqueous polymer dispersion is Rhodopas® AS 310, which is cited by the patent at issue on page 3, line 16) and for Example 8 (aqueous polymer dispersion Rhodopas® SD 215, which is cited by the patent at issue on page 3, line 41), since the developments of Example 1 of [D2] apply to Examples 7 and 8 insofar as the dimethiconol components are concerned.⁵

Subject Matter and Theory of [D3]

[D3] is a Dow Corning product catalog featuring several silicones. Page 6 describes mixtures of "C" silicones, such as Dow Corning® 1401 Fluid (INCI: cyclomethicone and dimethiconol), in "D" silicone emulsions, such as Dow Corning® 1784 Emulsion (INCI: dimethiconol and TEA-dodecylbenzenesulfonate). On page 9, [D3] suggests various silicones targeted for various hair-care product applications. The table on the left-hand side of page 9

⁵ TN: The French source text, itself a translation from the original German-language filing, is difficult to follow here. "Examples 7 and 8" seem to be references to D2, since the patent at issue has only three examples. The English translation of this paragraph is my best reading of the core meaning of the French text. A literal translation would read:

The same is true for Example 7 (the aqueous polymer dispersion is Rhodopas® AS 310, according to the invention of the patent at issue, page 3, line 16) and for Example 8 (aqueous dispersion of Rhodopas® SD 215 polymer, according to the invention of the patent at issue, page 3, line 41), for the dimethiconol components, the developments of Example 1 of [D2] apply respectively.

suggests the Dow Corning® 1401 and DC® 1403 silicones, as well as the DC® 1784 emulsion as suitable for cosmetic products for the hair.

The Problem — The Proposed Solution

During prosecution, the patentee pointed out that the compositions disclosed in [D2] do not disclose emulsions of the claimed silicones. Therefore, the difference between the compositions according to the invention of the patent at issue and the prior-art compositions is the form in which the specific silicones are present. Whereas the prior-art silicones [D2] are in fluid form (here, Dow Corning® Q2-1401), the patentee points out that the presence of the same silicones (non-amino α,ω -disilanol-terminated silicone, dimethiconol) in emulsion is a sufficient basis for inventive step. Leaving aside the fact that this has not been proven by appropriate comparative tests, replacing fluid dimethiconols with dimethiconols in emulsion is suggested by the prior art [D3].

Based on the closest prior art [D2], the goal was to offer alternative compositions having "good cosmetic properties," and in particular good cosmetic properties for the hair. A skilled artisan seeking variants of the compositions of [D2] must of necessity find in [D3] an indication that dimethiconols in emulsion (here under the trademarks [*sic*] Dow Corning® 1784) have properties comparable to those of fluid dimethiconols (commercial product Dow Corning® 1401) when used in cosmetic compositions for the hair.

Claims 2 through 15 are directly or indirectly linked to claim 1. Since a dependent claim that relies on an unpatentable independent claim cannot itself be patentable, claims 2 through 15 must meet the same fate as claim 1.

As a result, these specific embodiments are equally inappropriate as a sufficient basis for inventive step.

The process according to claim 16 of the patent at issue contributes no inventive step to the subject matter of claims 1 through 15, since application of an effective quantity to the hair is inherent in the concept of "conditioner" used in [D2], Example 1.

VI. Conclusion

The opposer therefore asserts that there is no proof that the patent at issue meets the requirements of Articles 100(a) or 100(b) EPC or Articles 54 and 56 EPC. This request for full revocation of the patent at issue therefore appears completely justified.

Beetz & Partner

Patent Attorneys
Steinsdorfstrasse 10 D-80538 Munich
Tel (089) 2168-9100 Fax (089) 2168-9200
email: info@beetz.com

Beetz & Partner Steinsdorfstr 10 D-80538 Munich

L'Oréal
Industrial Property Department
6, rue Bertrand Sincholle
F-92585 Clichy Cedex

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Your Ref: OA97110

Our Ref: 565-56.962EP-Sv

Munich: October 29, 2002

DEBIT NOTE NO: 2/7080

European Patent EP 1,005,323 – L'Oréal
Opposition filed by BASF

Preparation of French translation of BASF opposition
brief of August 14, 2002, pursuant to your instructions of
October 9, 2002 (see our faxed report of today), including
fees for typing, copying and faxing, and miscellaneous fees.

Total

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M 21-07-03

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D. A. CASALONGA – JOSSE

EUROPEAN PATENT AND TRADEMARK ATTORNEYS

PAUL-HEYSE-STRASSE 33 D-80336 MUNICH
TEL 89-22-80-05
FAX 89-22-47-53

E-mail: munich@casalonga.com
<http://www.casalonga.com>

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EUROPEAN PATENT OFFICE
Directorate-General 2
D-80298 MUNICH
GERMANY
0A97110—FB

M/Ref: B03/1094EP GD/VL

Munich, July 17, 2003

**Answer to opposition filed by BASF against
European Patent No. 1,005,323 in the name of L'ORÉAL**

The opposer has filed opposition on the grounds that the subject matter of the present patent is not novel and involves no inventive step. In the argument that follows, we will show that the opposition is without merit and must therefore be rejected, and that European patent No. 1,005,323 must be maintained.

I. Novelty

The opposer claims that the subject matter of the present patent is not novel. It is the opposer's view that the prior art document D1 discloses the subject matter of claim 1, thus destroying the novelty of the patent.

Prior Art Reference D1 (EP 0,240,349)

Prior art reference D1 discloses an aerosol hair-styling mousse comprising:

- from 0.1 to 5% of a hydroxylated polyorganosiloxane emulsion capable of forming an elastomer;
- from 3 to 30% of a propellant gas;
- water.

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This composition may contain various additives chosen from among polymers that are soluble or dispersible in the aqueous phase, high molecular weight silicones, low viscosity silicones, suspending agents, emulsion stabilizers, and other additives that are conventionally used in cosmetics, such as thickeners, fixatives, pH adjusting agents, chelating agents, oxidizing agents, and so on.

This prior art reference fails to provide clear and unequivocal disclosure of compositions containing an aqueous dispersion of insoluble polymer particles and a non-amino α,ω -disilanol-terminated silicone emulsion, present in the proportion of 0.05 to 10% by weight with respect to the total weight of the composition.

Prior art reference D1 discloses use of a silicone elastomer in combination with other components of the mousse. This elastomer is disclosed in US Patent No. 4,221,688 as a silicone emulsion having hydroxylated polydiorganosiloxanes, colloidal silica and a catalyst as the dispersed phase and having water as the continuous phase.

The hydroxylated polydiorganosiloxanes disclosed in the above-referenced US patent are linear polymers containing diorganosiloxane units, small numbers of monoorganosiloxane units, and small numbers of silicon atoms bearing two hydroxyl groups.⁶

Therefore, reference D1 does not explicitly disclose the combination of hydroxyl-terminated polyorganosiloxanes [*sic*] with an aqueous dispersion of insoluble polymer particles. To arrive at the invention, the skilled artisan would have had to choose from among the polymers disclosed in US Patent No. 4,221,688 and from among the optional components. If he had chosen polymers from among the optional components, he would still have had to choose from among the water-dispersible polymers and the water-soluble polymers.

Thus the subject matter of the invention of the present patent is novel over the combination of prior art references D1 and the US patent cited above.

As a consequence, the subject matter of claim 1 is novel over prior art reference D1, and the dependent claims are also novel (C-IV 9.5a, B-III3.8, C-III 3.6).⁷

II. Inventive Step

The opposer claims that the subject matter of the present patent does not involve inventive step over the combination of prior art references D2 and D3.

Prior Art Reference D2 (WO 92/21316)

Prior art reference D2 discloses compositions for treatment of the hair containing, in an aqueous medium:

⁶ TN: Note that this summary may not be entirely consistent with the US patent in question.

⁷ TN: Unknown codes.

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- at least one silicone;
- at least one latex that is insoluble in an aqueous medium;
- at least one agent capable of suspending silicone and latex; and/or
- at least one thickener.

The problem solved by the invention disclosed in reference D2 consists of repairing and restructuring damaged keratin fiber, maintaining this effect over a long period of time, and providing the fibers with properties of detangling and softness.

With respect to prior art reference D3, the opposer has failed to prove that this disclosure does in fact form part of the state of the art under Article 54(2) EPC. The date on which this reference was made available to the public has not been specified; only the years 1997 and 1998 have been cited. As a result, this reference must be set aside.

Moreover, this reference is not relevant to the present patent. This reference is a catalog listing silicones commercialized by Dow Corning and does not disclose the claimed combination.

The principal difference between the subject matter claimed and the closest prior art reference is that non-amino α,ω -disilanol-terminated silicone is present in the compositions as an emulsion.

The problem set by the present patent is to improve the setting power of cosmetic compositions containing water-soluble polymers while maintaining satisfactory spraying performance, short drying time for the aqueous composition, good cosmetic properties, and easy removal of the water-soluble polymer.

Since the technical problems solved by D2 and by the present invention are very different, the skilled artisan seeking to improve the setting power of compositions based on a water-soluble polymer would not be led to consult D2, which focuses on restructuring damaged hair.

Even if the skilled artisan had been led to consult reference D2, nothing in D2 suggests that he should combine an aqueous dispersion of insoluble polymer particles and a non-amino α,ω -disilanol-terminated silicone emulsion in a proportion of 0.05 to 10% by weight with respect to the total weight of the composition.

The silicones used in reference D2 are polyorganosiloxanes, listed as oils, waxes, gums or resins (page 2, line 34; page 3, line 2).

Nothing suggests that the skilled artisan should specifically choose non-amino α,ω -disilanol-terminated silicone from among all of the silicones presented in reference D2 in order to combine it with an aqueous dispersion of insoluble polymer particles with the goal of improving the cosmetic properties of a hair-setting composition. Furthermore, D2 contains no indication or suggestion that could have led the skilled artisan to use this type of silanol in emulsion.

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It was therefore not obvious for the skilled artisan to deduce the subject matter of claim 1 from D2. As a consequence, said subject matter involves inventive step.

The subject matter of the dependent claims also is novel and involves inventive step. Since the compositions according to the present invention are novel and involve inventive step, the process for treatment of the hair consisting of the application of said composition also is novel and involves inventive step (C IV 9.5a).⁸

We therefore request that the patent be maintained as issued and that the opposition be rejected.

We further request that oral proceedings be held in the event that the Opposition Division does not plan to grant the patentee's request.

[signature]
Gérard DOSSMANN
European Patent Attorney

⁸ TN: Unknown codes.

BASF AG Ludwigshafen

OEB

Erhardstr. 27
80331 MUNICH

Brevet européen N° : EP 1 005 323 B1

Numéro de la demande : 98942750.5

Titulaire du brevet : L'Oréal

Composition cosmétique contenant une dispersion aqueuse de polymère et une émulsion de silicone de disilanol et procédé

Priorité : 19/08/1997

Date de la demande : 18/08/1998

Nous formons

OPPOSITION

contre le brevet européen susmentionné.

Nous demandons l'annulation pleine et entière du brevet.

Nous demandons au besoin une procédure orale.

L'opposition est basée sur le fait que l'objet du brevet selon les articles 52 à 57 CBE n'est pas brevetable.

La justification est présentée en annexe 1.

Nous vous prions de bien vouloir prélever la taxe d'opposition (code 010) d'un montant de 610,00 € sur notre compte courant N° 2800.0009

La copie ci-jointe de ce courrier est destinée au service "encaissement et comptabilité".

BASF Aktiengesellschaft
p.O. Maurer (AV n° 3224)

P.J.

- Motivation de l'opposition
- Observations [D1] - [D4] (2 exemplaires)
- Copie pour le service comptabilité et encaissement.

I. Motivation de l'opposition

Le brevet litigieux n'est pas brevetable selon l'article 100a) CBE puisque les exigences concernant la nouveauté et l'activité inventive (article 54 et article 56 CBE) ne sont pas satisfaites.

II. Observations (voir annexe)

[D1] **EP 0 240 349 A2** (The Procter & Gamble Company)
publié le 7/10/87

[D2] **WO 92/21316** (L'Oréal)
publié le 10/12/1992

[D3] **Dow Corning**
Silicone für die Körperpflege - Auswahlleitfaden -
1997, 1998

[D4] **GB 2 114 580 A** (L'Oréal)
publié le 24/8/1983

III. Objet du brevet litigieux

L'objet du brevet litigieux (revendication 1) est une composition cosmétique, caractérisée en ce qu'elle comprend

- dans un milieu cosmétiquement acceptable

- une dispersion aqueuse de particules insolubles de polymère ("dispersion de polymère") et
- une émulsion de silicone de α,ω -disilanol non aminée ("émulsion de silicone")
- cette émulsion constituant 0,05 à 10 % en poids par rapport au poids total de la composition.

Pour simplifier, on revendique des compositions contenant 2 composants, une dispersion de polymère et une émulsion de silicone spécifique, la teneur en émulsion de silicone étant prédéterminée.

Les revendications dépendantes 2 à 15 sont axées sur les formes de réalisation préférées de la composition.

La revendication 16 concerne un procédé de traitement cosmétique des matières kératiniques dans lequel on applique la composition selon l'une des revendications 1 à 15 sur la matière kératinique à traiter.

IV. Nouveauté

IV.1 Absence de nouveauté par rapport à [D1]

[D1] décrit une composition cosmétique capillaire contenant une émulsion de silicone. Cette émulsion se compose d'une phase dispersée d'un polydiorganosiloxane hydroxylé stabilisé et anionique et d'une phase aqueuse continue ([D1] page 2, lignes 57 à 58). Les compositions cosmétiques capillaires du [D1] contiennent entre 0,1 à 5 % d'émulsion de silicone par rapport à la composition totale. Les compositions cosmétiques capillaires du [D1] peuvent contenir d'autres ingrédients, on préfère comme autres composants les

polymères fixateurs du cheveu [D1, page 3, ligne 19 à 20]. D1 cite comme polymères appropriés les polymères hydrosolubles ou hydrodispersibles.

Les compositions cosmétiques selon la revendication 1 sont donc déjà proposées par [D1] qui en annule la nouveauté.

V. Activité inventive

Si la division des oppositions devait malgré l'exposé des faits précédents reconnaître au brevet litigieux la nouveauté formelle, celui-ci ne reposerait cependant toujours pas sur une activité inventive.

Selon la description, le but du brevet litigieux est de proposer un agent fixateur du cheveu et présentant de "bonnes propriétés cosmétiques".

Objet et théorie du [D4]

[D4] décrit des compositions de traitement de la peau, des cheveux ou des ongles. L'exemple 6 du [D4] décrit une composition capillaire donnant du maintien contenant une dispersion de polymère aqueuse (Rhodopas® AM 012) et 2 % en poids (ingrédient actif) d'une émulsion cationique d'une amodiméthicone (Dow Corning® 929). Cette composition est déposée sur le cheveux et leur confère un "bon maintien" ([D4] page 12, ligne 15).

Objet et théorie du [D2]

[D2] décrit une composition de traitement des cheveux. L'exemple 1 du [D2] décrit ce que l'on appelle un produit "sans rincer" contenant une

dispersion aqueuse d'un acétate de polyvinyle (Rhodopas® A 012 PA de la société Rhône-Poulenc). Rhodopas® A 012 PA est cité dans le brevet litigieux à la page 3, ligne 14 comme dispersion de polymère aqueuse appropriée en vertu de la revendication 1. La composition cosmétique capillaire de l'exemple 1 du [D2] contient en outre 20,0 g d'un mélange de 13 % de diméthiconol avec 87 % d'autres silicones. Le diméthiconol est le nom INCI du diméthylsiloxane ayant des groupes terminaux hydroxyle (= α -hydroxy, ω -hydroxypolydiméthylsiloxane). Ce qui veut dire que la composition comprend 2,6 % de silicone selon la revendication 1 du brevet litigieux par rapport à la quantité totale de composition (100 g).

Il en est de même pour l'exemple 7 (la dispersion aqueuse de polymère est Rhodopas® AS 310, selon l'invention en vertu du brevet litigieux, page 3, ligne 16) ainsi que pour l'exemple 8 (dispersion aqueuse de polymère Rhodopas® SD 215, selon l'invention en vertu du brevet litigieux page 3, ligne 41), pour les composants diméthiconol, les développements de l'exemple 1 du [D2] s'appliquent respectivement.

Objet et théorie du [D3]

Le [D3] est un catalogue de produits de la société Dow Corning qui présente plusieurs silicones. A la page 6, on décrit des mélanges de silicones "C" donc par exemple Dow Corning® 1401 Fluid (INCI : cyclométhicone et diméthiconol), dans les émulsions de silicone "D", par exemple Dow Corning® 1784 Emulsion (INCI : diméthiconol et TEA-dodécylbenzènesulfonate). A la page 9 du [D3], on propose de manière ciblée pour l'application dans des produits de soins capillaires différentes silicones. Le tableau à gauche de la page 9 propose pour des produits cosmétiques capillaires aussi bien les silicones Dow

Corning® 1401 et DC® 1403 que l'émulsion DC® 1784 comme étant appropriées.

Problème posé - solution proposée

La titulaire du brevet a fait valoir dans la procédure de délivrance que les compositions décrites dans [D2] ne décrivent pas les émulsions des silicones revendiquées. Ce qui veut dire que les compositions selon l'invention du brevet litigieux se distinguent des compositions selon l'état de la technique par la forme sous laquelle se présentent les silicones spécifiques. Alors que celles-ci se présentent sous forme de fluide (ici Dow Corning® Q2-1401) dans l'état de la technique [D2], la titulaire du brevet fait valoir que l'on peut justifier une activité inventive par la présence des mêmes silicones (silicone de α,ω -disilanol non aminée, diméthiconol) sous forme d'une émulsion. Abstraction faite que cela n'a pas été prouvé par des essais comparatifs appropriés, le remplacement des diméthiconoles sous forme de fluide par des diméthiconoles sous forme d'émulsion est suggéré par l'état de la technique [D3].

En partant de l'état de la technique le plus proche [D2], le but a été de proposer des compositions alternatives qui présentent des "bonnes propriétés cosmétiques", notamment de bonnes propriétés cosmétiques capillaires. L'homme du métier à la recherche de variantes pour les compositions du [D2] trouve dans [D3] obligatoirement l'indice que les diméthiconoles sous forme d'émulsions (ici sous les noms de marque Dow Corning® 1784) présentent des propriétés comparables dans les compositions cosmétiques capillaires à celles des diméthiconoles sous forme de fluides (produit commercial Dow Corning® 1401).

Les revendications 2 à 15 sont directement ou indirectement liées à la revendication 1. Puisqu'une revendication dépendante reposant sur une revendication indépendante non brevetable ne peut être à son tour brevetable, les revendications 2 à 15 doivent subir le même sort que la revendication 1.

Par conséquent, ces formes de réalisation spécifiques ne sont également pas appropriées à justifier une activité inventive.

Le procédé selon la revendication 16 du brevet litigieux n'apporte à l'objet des revendications 1 à 15 aucune contribution inventive, puisqu'il est inhérent à la notion "d'après shampooing" utilisée dans [D2], exemple 1, d'être déposé en une quantité efficace sur les cheveux.

VI. Conclusion

Selon l'avis de la partie formant opposition, le brevet litigieux ne remplit donc pas de manière prouvée les exigences conformes aux articles 100a) ou 100b) ou article 54 et 56 CBE. La demande de retrait total du brevet litigieux paraît donc entièrement justifiée.

Patentanwälte

BEETZ & PARTNER

Steinsdorfstrasse 10 D-80538 München

Telefon (089) 2168 9100 Telefax (089) 2168 9200

email info@beetz.com

Beetz & Partner Steinsdorfstr. 10 D-80538 München

L'ORÉAL

Dép. Propriété Industrielle

6, rue Bertrand Sincholle

F-92585 Clichy Cedex

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V. Ref. OA97110

N. Ref. 565-56.962EP-Sv

München le 29 octobre 2002

NOTE DE DEBIT N° 2 / 7 0 8 0**Brevet européen EP 1 005 323 - L'ORÉAL**
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